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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 347

VITO GIALLO, ANTONINO VALENTI and JOSEPH C. JULIANO,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONERS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Opinions Below

No opinion was rendered by the District Court. The affirmance in the United States Court of Appeals for the Second Circuit was by a divided Court. Chase, Ch. J., wrote the prevailing opinion concurred in by Clark, C. J. Frank, C. J., wrote the dissenting opinion. These opinions are reported at 206 F. 2d 207.

Jurisdiction

The judgment of the Court of Appeals was entered on August 20, 1953. The Petition for a Writ of Certiorari

was filed September 16, 1953. Certiorari was granted by order of this Court on November 9, 1953.

The jurisdiction of this Court is invoked under Rule 37 (b) of the Rules of Criminal Procedure and Title 28, Section 1254, United States Code.

Questions Presented

1. In the instant case, did not the participation of the trial judge so far exceed the limits of judicial discretion and propriety as to deprive the petitioners of the fair and impartial trial to which they were entitled?

2. Did not the trial judge by (a) his many acts of advocacy, (b) his evident partiality in his frequent and repetitious direct and cross-examination of witnesses, especially the petitioner, Juliano, and the witnesses called by the defense, (c) his constant interference with defense counsel in their questioning of both prosecution and defense witnesses, (d) his general over-zealousness in "taking over" for the prosecution, and (e) in his unwarranted, harassing and sarcastic remarks to petitioners' counsel, nullify their effective representation of their clients and thus deprive petitioners of their rights under the Fifth and Sixth Amendments to the United States Constitution of a trial by an impartial jury and of due process of law?

3. Did not the trial judge by his unwarranted exhibition of unreasonable impatience with petitioners' counsel and his heaping of sarcasm upon them, fail to maintain that detached and impartial attitude which is necessary to preserve a proper atmosphere and to insure a fair trial, to the grave prejudice of the petitioners?

4. Was it not an improvident exercise of discretion for the trial court to deny the motion for a mistrial made by

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counsel for petitioners, Giallo and Valenti, when the prosecution witness, Gianatasio persisted in making unresponsive and gratuitous statements which were calculated and designed to gravely prejudice these petitioners? (144, 147 to 151).* Proper exception was taken to this ruling of the Court (151).

Statutes Involved

Title 18, Section 371:

> "Conspiracy to Commit Offense or to Defraud United States
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The indictment in this cause is set out in extenso on pages 13, 14 and 15 of Appendix to Appellants' Brief (37 to 45). The sections of Title 26, United States Code, referred to in paragraph 1 (39) all have to do with the registration and bonding of stills, the taxation of alcohol, the operation of distilleries, the fermenting of mash for distillation purposes and the possession, transportation and sale of untaxpaid liquor. The said sections are not set out in extenso for the reason that to do so would only encumber the record and would not shed any light upon the reasons, factual and legal, advanced by petitioners for the granting of the relief prayed for in the within petition.

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* References are to folios of Appendix to Appellants' Brief in the Court below.

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Statement

The petitioners, Giallo and Valenti, were charged in Count I of the indictment with Conspiracy to violate a number of sections of the Internal Revenue Regulations having to do with the operation of unlicensed stills, the fermenting of mash, and the possession and sale of alcohol on which the taxes had not been paid (39).

The petitioner, Juliano, was charged in the said indictment with Conspiracy together with the other petitioners above named, and also in Count II with the possession of the still located on his farm property (45).

Prior to the commencement of the trial the Government severed the case as to the defendants, DiLorenzo and Sam Schifano, Sr. (20). The defendants, Bosco, Lango and Cutugno pleaded guilty prior to the commencement of the trial. The defendant, Schick, was never arrested.

The trial commenced on October 9, 1952, and continued on the 10th, 14th, 15th, 16th and 17th days of October, 1952. On October 20, 1952 the Court instructed the jury, whereupon it retired and deliberated from about 11 A. M. to about 9 P. M., at which time it returned a verdict of guilty against all three petitioners on Count I, the Conspiracy count. It failed to agree as to Juliano on Count II, the substantive count, and was discharged as to him on this count (400 to 402). It acquitted Sam Schifano, Jr. (400). The Court dismissed the indictment as to Carlo M. De Julius at the end of the Government's case.

The theory of the prosecution was that the petitioner Juliano, who was the owner of a farm at West Shokan, New York, had knowingly rented it to one Giollano, for the operation of an illicit still in the barn on his premises, and had knowingly permitted the still to be operated therein. And that the petitioners, Giallo and Valenti, had supplied sugar for the still's operation, and had some interest

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therein and in its product. However, these petitioners (Giallo and Valenti) were charged only with conspiracy (37 to 45).

On February 15, 1950, investigators of the Alcohol Tax Unit, armed with a search warrant, raided the Juliano farm, where they found in the barn thereof a still which admittedly was unregistered, and which was equipped for the purpose of manufacturing alcohol.

The farm at West Shokan had been purchased by Juliano in 1946. He had lived there with his wife and three small children, attempting to farm the property but without success (238). He also continued working as a handyman doing plumbing and refrigeration work (239, 263, 267). About Labor Day of 1949, this petitioner despaired of making the farm pay, and moved his family to a brother-in-law's dairy farm at New Berlin, New York, about one hundred miles away (234). He determined to dispose of the West Shokan farm and listed it with a broker for sale (240, 241). On several occasions he returned to the West Shokan farm to pick up some of his belongings, more especially tools which he needed in his work (236).

Juliano had returned to his farm on February 10, 1950 and remained there the following day, the 11th (336). On the morning of the 12th he left to return to New Berlin (337). He was again returning to the farm on the 16th, when neighbors at the crossroads told him that a large still had been found during a raid on his farm premises the day before (297, 298). He returned to his brother-in-law's place at New Berlin without stopping at his farm (299). On February 20th, when requested by agents of the Alcohol Tax Unit to see them at the farm at West Shokan, he did so (75). He gave the agents a comprehensive story of his life, told them of his purchase of the farm, his failure as a farmer, his attempts to sell the property, and of his decision to move to his brother-in-law's place at New Berlin, where he obtained employment at nearby Sidney, New York (78, 79).

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He stated that about December 2, 1949 he returned to the farm, and while there some ten or fifteen days, a man came to the farm and said he was interested in renting the place for the storage of trucks and his car (80, 246). After some haggling Juliano rented the barn and the house, with the exception of one room which he reserved for his own use, to this man for $65 a month (80, 257, 248). The man gave him a card bearing the name Giollano Trucking Corp. (248). He further stated that when he returned to the farm a few days before Christmas, 1949, he found two other men there, one a fellow named Jack (323, 327) who claimed he was the son of the man who rented the farm (273, 329). No arrest followed this interrogation.

On February 27, 1950 Juliano was again requested to appear before the Alcohol Tax Unit agents at their office in Newburgh, New York (116). He responded and was again interrogated, this time by special agents. He was then arrested (317). This happened immediately after Juliano refused to sign a statement prepared by the agents (347, 348). The petitioners Giallo and Valenti, were not seen at the Juliano farm and were not arrested until after the indictment herein was filed on March 29, 1951 (152).

Agents of the Alcohol Tax Unit testified that they observed that the petitioners, Giallo and Valenti, had for some period of time been seen in the immediate vicinity in a certain green colored Ford truck (later testified to by DiLorenzo as having been sold by him to these petitioners (125)). The agents testified that this truck was seen by them on the road which could be taken to go from New York City to West Shokan, New York, and that its destination was finally traced to a farm in that vicinity owned by the Petitioner, Juliano. The said green colored truck above mentioned was seized while driven by defendant, Bosco, as it was approaching the farm of the petitioner, Juliano, on the day of the raid, February 15, 1950. Since the granting or denial of this petition does not turn upon the nature of the evidence adduced against the petitioners,

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Giallo and Valenti and their participation in the conspiracy charged in the indictment, no further details with respect thereto are deemed requisite.

The petitioner, Juliano, testified in his own defense. He was the only one of the petitioners herein to do so. He denied that he knew that the house and barn were being rented for the operation of an illicit distillery, or that he had ever heard anything untoward going on at the farm on the several occasions when he came there in order to secure tools which he needed for his work as a mechanic.

During the six days of the taking of testimony (778 pages), the Court asked approximately 750 questions, of which some 250 alone were directed to the petitioner, Juliano.

Specification of Errors to be Urged

The Court of Appeals erred:

1. In affirming the judgment of the District Court, holding that the petitioners were not gravely prejudiced and that their constitutional rights under the Fifth and Sixth Amendments of the United States Constitution, to a fair and impartial trial and due process of law, were not nullified by the excessive zeal of the trial judge and his uneventempered and inordinate participation in the trial.

2. In affirming the judgment of the District Court, holding that it had not improvidently exercised its discretion in denying the motion for a mistrial made on behalf of the petitioners, Giallo and Valenti, when the witness, Gianatasio (a government agent) deliberately persisted in making gratuitous, unresponsive and prejudicial statements, in refusing to admonish this witness and in declaring his statements to be unprejudicial.

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ARGUMENT

POINT I

The Court "took over" the prosecution, severely and persistently cross-examined the defendant, Juliano, only gently remonstrated with Government witnesses, unreasonably interfered with the direct and cross-examination by defense counsel and was unduly impatient and harsh with defense counsel to the point of being sarcastic, without cause. In general, it failed in its duty to maintain the required standard of unswerving impartiality between the Government and the accused. It thereby nullified the petitioners' constitutional rights under the Fifth and Sixth Amendments of the United States Constitution, to a fair and impartial trial and due process of law.

During the six days of the taking of testimony (778 pages), the Court asked approximately 750 questions. In making this computation, questions which were merely routine such as those usually asked for the purpose of identification have not been considered.

After objection had been made to the answer of the witness, Carroll, that a defendant, Giallo, was "watching the progress of the truck," the Court sustained the objection and taking over the direct examination of this witness proceeded to ask the same question based on what the witness had been "led to say that he was watching the truck" (50, 51).

The Court took over the direct examination of this witness to inquire regarding the elapsed time between the occasions when he saw the appellant, Valenti, and added the description of "circling the premises," which was then not the object of the prosecutor's inquiry (52, 53).

During the direct examination of a Government witness who had answered using the words "illicit distillery," the Assistant United States Attorney moved to strike out the word "illicit." The Court then said, "If the defendants don't move, no reason why you should move" (54). Compare this thoroughly partial statement with the Court's own admission of error in the use of this word on page 55 of the stenographic transcript.

The Court on its own motion interposed an objection to a question on cross-examination, which was designed to indicate that a truck did not travel on other than main arteries of travel and thus not in a surreptitious manner, sustained its own objection and proceeded to ask the same question in another fashion. Although the answers elicited by the Court's questions did not prejudice the defendants, the manner in which it was done, was calculated to cast doubt on either counsel's ability to properly formulate the inquiries or what is worse, counsel's desire to establish the truth (54, 55, 60).

The Court unwarrantedly and severely criticized counsel for not objecting to an answer before it was given by the witness. Although the Court struck out the answer, its criticism was harsh and cast doubt on counsel's ability or honest intention in the circumstances (57, 58).

The Court again was caustic in observing that he was the one who made the rulings and sarcastic in thanking counsel for his "guidance," all of which was thoroughly unwarranted. The Court then proceeded to make an erroneous statement of the legal reason for the admissions of Juliano after the raid on the still, being binding only on him and not on the other defendants on trial (75 to 77).

The Court interrupted the cross-examination of a Government witness and took over the examination (93 to 99).

The Court interrupted the cross-examination of a Government witness and criticized counsel for an alleged pre-

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sumptuous remark; an entirely unwarranted and unnecessary action (120, 121).

The Court interjected itself in the direct examination of a Government witness giving testimony on a most crucial issue, and assuming the role of prosecutor in a series of eleven questions, adduced what the Assistant United States Attorney apparently was unable to do; and finally succeeded in getting this witness to testify that a truck he allegedly sold to the defendants, Giallo and Valenti, was being bought first "to carry a heavy load," then "a heavy load of sugar" and finally "for the illegal purpose of alcohol and sugar" (129).

The Court unduly and erroneously restricted the cross-examination of a Government witness as to the facts of the crime of manslaughter of which he had been convicted and was then serving a sentence imposed by the Courts of the State of Connecticut. When counsel persisted, the Court hampered him on an important issue and unduly and erroneously limited him. This served to rehabilitate a twice convicted criminal witness and elicited his thanks to the Court (131 to 135).

The Court permitted this witness, Di Lorenzo, who was named as a defendant in the indictment being tried, against whom the trial had been severed, but who continuously and persistently claimed that he was innocent and who had at no time entered a plea of guilt, to testify to facts which were completely incriminating, without any warning as to his constitutional rights. Then the Court proceeded to further rehabilitate this witness and intimate to the jury by asking questions and making statements, that because this witness had not had any part in the "running of this still" or the "distilling of alcohol" and was "just a customer," he was innocent of the charge of conspiracy in the indictment. The Court further erred on the law, after the said witness' connection was alluded to by counsel, by saying that it was "for the jury to say whether it was part of the conspiracy", when this very testimony was being ad-

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duced by the prosecution to prove that Giallo and Valenti were guilty of the conspiracy there charged. In other words, the Court erroneously stated by implication, that although this witness had admitted by his testimony that he was a co-conspirator with Giallo and Valenti and had purchased alcohol from them, he might nevertheless, not be guilty, and it was for jury determination whether the others were, based on his testimony. A most anomalous situation in the light of the evidence (136 to 139).

The Court undertook to make pointed inquiry and then critically commented on counsel's purpose in his cross-examination (161 to 165).

The Court, without any inquiry as to the object counsel had in his hand, which was a comb, told counsel to "put that knife away, or whatever you have in your hand" (166).

The Court interrupted the cross-examination of a Government agent, took over, and acted as prosecutor (167, 168).

Upon the prosecution's offer of exhibits in evidence consisting of samples of the contents of mash vats, and objection being made that no connection between the exhibits and the defendants, Giallo and Valenti, had been established, the Court abdicated its province and stated it was for the jury to determine whether these defendants "are connected with this bottle or its contents" (170 to 171).

The Court proceeded to unwarrantedly and unreasonably criticize counsel's manner of cross-examination of a government witness (173 to 175).

The Court once again assumed the role of prosecutor in eliciting testimony as to a Government's witness' identification of a photograph of one of the defendants, unwarrantedly interrupting the cross-examination of this witness (177).

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The Court interrupted the cross-examination of a Government witness whose testimony as to a very material fact, his absence from his place of employment due to sickness on the days he is alleged to have observed the absence from the garage of the green Ford truck, and to have so informed the witness who preceded him, by saying "Is that a fact, or was it just a week-end indisposition?" (180).

The Court again became prosecutor, interrupted the cross-examination of this witness and proceeded to ask twenty-five consecutive questions (182 to 195).

The Court "took over" the direct examination of the witness, Roschitsch, and relieved the prosecution (195 to 212).

The Court unwarrantedly came to the assistance of a Government witness, interrupting counsel's cross-examination (215 to 216).

The Court again "took over" the duties of direct examination, properly belonging to the prosecutor and asked thirteen consecutive questions (218 to 221) and the very same thing occurred at folios 222 to 225.

The Court instead of admonishing the witness for volunteering unresponsive answers, criticized counsel for allegedly usurping his prerogative (226).

The appellant, Juliano, was the only one to take the stand. The Court during his direct and cross-examination continuously and persistently interrupted both the Assistant United States Attorney and defense counsel and asked of this appellant alone approximately 266 questions, exclusive of those the plain purpose of which was clarification. When asking these questions the Court clearly expressed its disbelief of this appellant's veracity, but what is worse, it conducted the cross-examination thus relieving the prosecution of its legal burden. It assumed the role of a partisan and joined the hue and cry against all the accused (*U. S.* v. *Hunter*, 62 F. 2d 217, 220; *U. S.* v. *Marzano*, 149 F. 2d 923).

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The Court interrupted the direct examination of the defendant, Juliano, and began to cross-examine him on his competency in pipe-fitting, it having been testified to, that this defendant had purchased a small quantity of pipe and fittings and it having been previously adduced in evidence that when the still premises were raided, parts of the still had had pipe connections. The purpose was evidently to show that this defendant had purchased the pipe and fitted it on to the still. This was for the prosecution to do and not for the Court. It thus assumed once again the role of prosecutor (231 to 232).

Again the Court broke into the direct examination of Juliano and asked 34 consecutive questions all of which were designed as the most severe cross-examination (252 to 259).

The Court unwarrantedly held Juliano's counsel up to ridicule when he charged him with attempting "to contradict his own witness" (276). And again, the Court undertook without any warrant to criticize this attorney for his "dramatics" and instructed him "to stop those shenanigans" (289 to 290).

The Court once more interrupted the direct examination of Juliano, became once again the prosecutor and cross-examined him severely on the size of the still which he had maintained he didn't know existed in the barn (297 to 299). And shortly after, the Court resumed his interruption of the direct examination to cross-examine him about his not going into the barn (314 to 315). The Court also took it upon itself to cross-examine Juliano pointedly about a revolver he said he had left in his desk at the farmhouse (324).

Relieving the prosecution of its burden and becoming an out and out partisan, the Court interrupted the cross-examination of Juliano and proceeded to ask 19 consecutive questions on its own cross-examination. All these questions were for the obvious purpose of discrediting the wit-

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ness and this is well pointed up by the Court's gratuitous comment to the effect that the defendant impressed the Court as an alert young man (326 to 330). This statement coupled with the subsequent cross-examination of the Court was solely calculated to cast doubt on this witness' credibility and to apprise the jury that it was the Court's opinion that he could not be as credulous as was made to appear. The additional statement "Of course, the jury is to determine whether you are alert" (327) served only to accentuate the harm and prejudice.

Once again the Court interrupted the cross-examination by the prosecutor to embark on its own cross-examination and asked 44 consecutive questions, all designed to discredit the witness (332 to 339).

The Court became cross-examiner and "took over" from the prosecution; it severely interrogated this defendant asking 14 consecutive questions with regard to a statement (Govt.'s Exh. 63 for Iden.) which Juliano had refused to sign (348 to 351). And the Court pursued this tack when it cross-examined Juliano and asked 34 consecutive questions of him relative to a pair of telephones and wire (360 to 365). The Court continued the same severe cross-examination for the sole purpose of breaking down this witness, thereby once again relieving the prosecution, becoming a partisan and failing to observe the unswerving standard of impartially (366 to 369).

Even when the witness, Joan Jordan, took the stand, the Court could not refrain from its course of unwarranted interference with cross-examination and proceeded to ask 17 consecutive questions (389 to 391).

It will be observed that the Court "took over" for the prosecution and interrupted direct examination and cross-examination as the whim struck it, asked long series of questions for the obvious purpose of casting doubt on the veracity of the defendant, Juliano, and the defense witnesses. The Court was overzealous in this respect. Coun-

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sel were prevented from properly representing their respective clients because of the fear of injuring their clients' cause by objecting to the Court's advocacy and harassing interrogations which were repeated so often. On the other hand, the Court was most gentle in its treatment of the witnesses for the prosecution even when they gratuitously injected unresponsive matter calculated to cause grave prejudice to the accused.

Regarded separately and singly, these acts on the part of the trial judge may appear magnified, but their cumulative effect was such as to deprive the petitioners of the fair and impartial trial and due process of law guaranteed to them by the Fifth and Sixth Amendments to the United States Constitution (*United States* v. *Brandt* (C. A. 2), 196 F. 2d 653).

The majority opinion grudgingly admits that "The record does show that the judge took an active part in the examination of witnesses which seems to have been more extensive and less even tempered than is to be commended." However, it does not find that the trial judge was so partial and so much an advocate for the prosecution as to require a reversal. It cites the case of *United States* v. *Marzano*, (2 Cir.) 149 F. 2d 923. As pointed out in the dissenting opinion of FRANK, *C.J.*, the error in that case involved a different type of judicial misconduct, i.e., direct threats by the trial judge against a witness, but the principle of law there stated by Judge LEARNED HAND is none the less applicable to the facts in the instant case.

As is further pointed out in the dissenting opinion, the trial judge, by his inordinate participation in the examination and cross-examination of the defense witnesses at the trial, violated the principle of law stated in *Quercia* v. *United States*, 289 U. S. 466, 469. He patently disclosed by his manner of questioning the defense witnesses, his disbelief in their veracity. But when the judge did so, his disbelief was implied and not expressed, and was not coupled

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with the warning that this Court said in the *Quercia* case, must be given to a jury contemporaneously, to the effect that they must reach their own independent conclusion as to all matters of fact and especially with respect to the guilt or innocence of the accused.

In *Adler* v. *United States* (5 Cir.), 182 F. 464, 472, the Court said:

> "The impartiality of the judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential rule of especial importance in criminal cases. The importance and power of his office, and the theory and rule requiring impartial conduct on his part, make his slightest action of great weight with the jury. While we are of the opinion that the judge is permitted to take part impartially in the examination or cross-examination of defendant's witnesses we can readily see that if he takes upon himself the burden of the cross-examination of defendant's witnesses, when the government is represented by competent attorneys, and conducts the examination in a manner hostile to the defendant and the witnesses, the impression would probably be produced on the minds of the jury that the judge was of the fixed opinion that the defendant was guilty and should be convicted. This would not be fair to the defendant, for he is entitled to the benefit of the presumption of innocence by both judge and jury till his guilt is proved. If the jury is inadvertently led to believe that the judge does not regard that presumption they may also disregard it.
>
> A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge. Besides, the defendant's counsel is placed at a disadvantage, as they might hesitate to make objections and reserve exceptions to the judge's examination, because, if they make objections, unlike the effect of their objections to questions by opposing counsel, it will appear to the jury that there

is a direct conflict between them and the court. If it were the function of the judge in this country, as it is in some foreign tribunals, to perform the duties incumbent here on the district attorney, the impression produced on the minds of the jury against the defendant would not be so inevitable.

Counsel are expected to maintain an attitude of respect and deference toward the judge, and this attitude is maintained without difficulty when the judge confines his activities to the usual judicial duties. And the judge can more easily treat counsel with the respect due an officer of the court in the performance of a duty, if he avoids the performance of the duties incumbent properly upon an attorney representing one side of the case."

In *Hunter* v. *United States* (5 Cir.), 62 F. 2d 217, 220, it was held:

"The assignments of error based on the district judge's cross-examination of appellant, are, in our opinion, well taken. While the method of cross-examination, if it had been conducted by the district attorney, might have been proper, a district judge ought never to assume the role of a prosecuting attorney and lend the weight of his great influence to the side of the government. It is the judge's duty to maintain an attitude of unswerving impartiality between the government and the accused, and he ought never in any questions he asks go beyond the point of seeing to it, in the interests of justice, that the case is fairly tried. We refer with entire approval to what Judge Shelby, speaking for this court long ago, said on this subject in *Adler* v. *United States*, 5th Cir. 182 F. 464 * * *. It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the layman on the jury to be impartial."

And in *Baker* v. *United States* (5 Cir.), 156 F. 2d 386, 389, it is stated:

> "Firmly committed, as we are, to the proposition that while it is the duty of a trial judge to conduct the trial with firmness, understanding and judgment, it is equally his duty to conduct it with patience, politeness, fairness and moderation and that he is not to dominate the trial or to do more than, as administrator of it, keep it within legal bounds * * *."

In *Williams* v. *United States* (9 Cir.), 93 F. 2d 685, the Court held:

> "The harm done when the trial judge departs from that attitude of disinterestedness which is the foundation of a fair and impartial trial is not diminished because the judge so acts by reason of unrestrained zeal or through inadvertence and is unintentionally unfair.
>
> It is improper for the court to take away the examination of witnesses from counsel when they are conducting their cases in an able and lawyer-like manner and then conduct the examinations his own way."

It is respectfully contended that the trial judge in the instant case became a partisan for the prosecution and in a very large measure took over the duties of the prosecutor, which obviously was a biased and partial act of advocacy. A very apt statement of the proposition contended for by petitioners is to be found in *United States* v. *Billeci* (App. D. C.), 184 F. 2d 394, 403. There the Court said:

> "The public interest requires that persons who have committed crimes be convicted of them. But the responsibility for producing the evidence which will persuade twelve jurors of guilt beyond a reasonable doubt is upon the prosecutor. It is a serious public responsibility, but it is upon the prosecutor and upon him alone. The judge has no part in that task. The prosecutor represents society in the prosecution, the attorney for the defense represents the

accused. The judge is a disinterested and objective participant in the proceeding. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge" (Judge Learned Hand in *United States* v. *Marzano*, 149 F. 2d 923, 926).

* * * * * *

"It is a serious thing for an appellate court to reverse convictions in criminal cases. But the controlling importance is that the law be followed. The rules of law applicable to the function of the judge in a criminal trial by a jury are well settled. No matter what the impulse may be to transgress or evade them under provocative circumstances they must be observed. This is basic, without exception and compulsory."

The record here amply indicates that the trial judge failed in this duty to the grave prejudice of the petitioners.

Since Juliano testified that he at no time had known or seen the petitioners, Giallo and Valenti, prior to their meeting in the courthouse when arraigned for pleading to the indictment which was on April 6, 1951, something like 15 months after the seizure of the still (5, 372 to 377), the continuous cross-examination by the Court of this petitioner for the sole and evident purpose of discrediting his testimony, the advocacy of the Court and the "taking over" of the prosecution by the Court, could only serve to reflect adversely on Giallo's and Valenti's interests (*Williams* v. *United States*, 93 F. 2d 685, at pp. 688, 689.)

The majority in the Court of Appeals significantly fails to make mention of the decision of its own Court in *United States* v. *Brandt* (C. A. 2), 196 F. 2d 653. In said case, the Court of Appeals for the Second Circuit held that activities of the trial judge, markedly similar to those here, constituted reversible error. As FRANK, *C.J.*, says in his dissenting opinion in referring to said case (*United States* v. *Brandt*, supra):

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> "There we said that the trial judge must remain impartial, judicious, and, above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested. * * * In the case at bar this mandate of judiciousness appears to have been breached on unfortunately more than a single occasion. Thus the examination of witnesses and discussions with counsel by the court were spotted with a number of remarks which were not of the form to elicit information or direct the trial procedure into proper channels, but rather to cut into the presumption of innocence to which defendants are entitled. Beyond this the court actively cross-examined several witnesses, notably the defendant Brandt himself, to a quite unusual extent. This interrupted the orderly presentation of evidence by the defense. But further the questioning appeared mainly to underline inconsistencies in the positions, or to elicit admissions bearing on the credibility, of defense witnesses. In *Brandt's* case, the government, on the strength of *United States* v. *Aaron*, 190 F. (2d) 144 (C. A. 2), cited here by my colleagues, had argued that the charge had cured these defects. This Court replied: 'Such admonitions may offset brief or minor departures from strict judicial impartiality, but cannot be considered sufficient here. For the 900 questions asked by the court during this eight-day trial present far more examples of serious incidents. The cumulative effect of these we are unable to hold cured by the formal charge given.'"

At this point it is most appropriate to refer to the statement by JACKSON, *J.*, in *Krulewich* v. *United States*, 338 U. S. 716, 722, 723:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, see *Blumenthal* v. *United States*, 332 U. S. 535, 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore* v. *B. & O. Railroad Co.*, 2nd Cir., 167 F. 2d 54."

In *Simon* v. *United States* (4 Cir.), 123 F. 2d 80, it appears that the Court questioned the witness "from time to time" in an effort to bring out the facts of the case and

the report of this case as said by FRANK, *C.J.*, "discloses no facts which furnish a yardstick for the judge's role in the instance case."

Likewise in *United States* v. *Aaron* (2 Cir.), 190 F. 2d 144, 147, in commenting upon the complaint that the trial judge had unduly participated in the questioning of witnesses and had assumed a prosecutor's role, the Court said:

> "Much of the fault found with him (the trial judge) concerns what did not occur within the presence of the jury."

Consequently, neither do the facts in said case furnish a proper measure for comparison with the conduct of the trial judge in the instant case.

The trial court's unwarranted criticism of defense counsel and its indiscretion in this regard was referred to by Judge A. N. HAND of the Court of Appeals for the Second Circuit in another case (*United States* v. *Minuse*, 114 F. 2d 36, 39), in the following manner:

> "The court exhibited unreasonable impatience with defendants' counsel and failed to maintain that detached and impartial attitude which is necessary to preserve a proper atmosphere and to insure a fair trial. Furthermore, there plainly was no justification for the constant interference by the court with counsel in their attempt to examine their witnesses. It did not expedite matters for the judge to take over such a large proportion of the examination and imposed unmerited burdens."

Of course, as is pointed out in the dissenting opinion, "It is no excuse that government counsel lacked experience." As a matter of fact, the assistant district attorney, who is described so disparagingly by his superior in his brief in the Court of Appeals, as being inexperienced and "manifestly not a master of the art of cross-examination," was at all times during the trial attended and assisted by two other assistant United States attorneys of many years of trial experience, Messrs. Kaplan and Burchill.

While counsel is fully cognizant of the difficulty that presents itself in attempting to lay down a rule or to formulate a set of rules for the conduct of a trial judge during the course of a trial, it has been recognized that certain standards are necessary. For instance, a federal trial judge, this Court has said, in *Quercia* v. *United States*, 289 U. S. 466, 469, may not comment on the evidence, unless he advises the jury, at the same time, that they are in no way bound by his views in their determination of the guilt or innocence of the accused and that all matters of fact are submitted to them for their determination.

An overzealous trial judge by injudicious and unjudicial conduct, by injecting himself unduly into the trial, by unlimited participation in disruptive examination and cross-examination of the witnesses called and especially of the accused and their witnesses for the obvious purpose of casting doubt on their veracity and to accentuate whatever inconsistencies there may be therein, by subjecting counsel to harassment and sarcasm, commits seriously prejudicial acts of advocacy and joins the hue and cry against the accused. He thereby lends the great weight of his authority to the prosecution to the grave prejudice of an accused.

Such conduct on the part of a trial judge results in a subtle erosion of the constitutional guarantees afforded an accused by the Fifth and Sixth Amendments to the United States Constitution, of a fair and impartial trial and of due process of law. This is what occurred in the instant case.

As was said in *Bollenbach* v. *United States*, 326 U. S. 607, 612:

> "The influence of the trial judge on the jury is necessarily and properly of great weight, *Starr* v. *U. S.*, 153 U. S. 614, 626, and jurors are ever watchful of the words which fall from him."

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See also, *United States* v. *Haupt*, 136 F. 2d 661, 671; *United States* v. *Levi*, 177 F. 2d 833, 837; *Virginian Ry. Co.* v. *Armentrout*, 166 F. 2d 400, 405.

POINT II

It was an improvident exercise of discretion to deny the motion for a mistrial made on behalf of Giallo and Valenti.

The witness, Gianatasio, an agent of the Alcohol Tax Unit, with more than twenty years service in this capacity, deliberately set out to bring to the attention of the jury the fact *that he was known to Valenti* (143). When being interrogated on cross-examination as to where Bosco and Valenti had gone and after having indicated that it was to a restaurant, he added the gratuitous and unresponsive statement, *"Because I figured he might know me"* (143). The purpose of this statement was obviously to convey to the jury that he, an agent of the Alcohol Tax Unit, was known to Valenti, and this despite the unwitting use of the subjunctive mood.

It is true that when counsel for Valenti moved to strike this statement as gratuitous and voluntary, the Court did so, but it is significant that it curtly refused to admonish the witness (144). By such refusal it not only created the impression on the jury that what the witness had done was not improper but it served to encourage the witness to repeat the offense, as is evidenced by his deliberate injection of a further gratuitous, voluntary and most prejudicial observation as to the defendant, Giallo (147, 148):

> "Q. And when you seized the Plymouth black sedan from Mr. Giallo, he told you to all your questions, directly that he didn't know anything about it and had never been in West Shokan, is that right? A. That is right. *I also told him the reason I wasn't arresting him was because he was out on bail——*" (Emphasis supplied.)

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The only reason one can assign for this unresponsive, additional, gratuitous and most harmful observation is a preconceived, deliberate and purposeful attempt to bring to the attention of the jury the fact that he, an Alcohol Tax Unit agent was aware of the fact that Giallo was then at large on bail. Considering his capacity as an enforcement officer of the Alcohol Tax Unit, which had been brought to the jury's attention by the prosecution immediately this witness was sworn, this statement was most prejudicial and the jury could arrive at no other conclusion but that Giallo was then "out on bail" in connection with an offense or crime of which the witness was cognizant as a result of his official connection with the Alcohol Tax Unit, i. e., a similar crime to that for which Giallo was then on trial.

When counsel most respectfully and with the utmost deference and courtesy, informed the Court that he was going to move for a mistrial if any more voluntary statements were forthcoming from this witness (148), the Court instead of now admonishing the witness (which it had refused to do on the occasion of the first breach) (144), commenced to berate counsel for his manner of addressing the Court. By contrast, its manner of advising the witness to desist from similar statements was actually gentle (149).

But what stands out like the proverbial sore thumb is that after ordering this statement stricken from the record, the Court made the following rejoinder to counsel's motion for a mistrial (149, 159):

> "Mr. Chapman: I think for the record, I ought to move for a mistrial because the witness has twice volunteered statements not responsive to any questions, and serving to prejudice my client.
>
> The Court: I don't regard that as prejudicial.
>
> Mr. Chapman: Your Honor will overrule it?
>
> The Court: The jury will erase anything from their minds that I have stricken from the record.
>
> Mr. Chapman: That is a very, sometimes a very hard thing to do."

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The Court thereupon, without inquiring of counsel as to his acquiescence in the procedure, inquired of the jury whether the remarks of the witness, which it had already stated it considered *unprejudicial*, would in any way cause them not to give fair consideration to the "guilt or innocence of any of these defendants", determined that the jury had "indicated in the negative", and denied the motion (150, 151).

Thus the Court actually criticized counsel, whereas the criticism should have been visited on the witness. It further accentuated the prejudice in the remark of the witness by addressing the jury with respect to it.

With respect to this contention, the majority in the Court below takes the attitude that counsel for the petitioners Giallo and Valenti increased any likelihood of harm by making it appear of record that the petitioner, Giallo, was not arrested on the indictment in this case until March 29, 1951, after it was filed.

It is respectfully submitted that this criticism is unwarranted and counsel would have been remiss in his duty had he left the matter to the speculation of the jury. Since it is contended that these unresponsive, gratuitous and prejudicial remarks were preconceived, deliberate, and made with the purpose in mind of conveying to the jury that the petitioners had previously been in conflict with the law relative to alcohol taxes, it would have been the height of stupidity to permit the implication and in fact the express statement of the trial judge that they were *not* prejudicial (159) sought to be implanted in the jury's mind, to go unchallenged. Therefore, the statement that it was defense counsel who accentuated the likelihood of harm caused by the government's witness' statements is, it is respectfully submitted, without any fair basis in fact or law.

Lastly, there are, to be sure, cases which hold generally that prompt action by the Court in striking unresponsive,

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prejudicial but inadvertent remarks of a witness, dispels the harm done and is not cause for a mistrial (*United States* v. *Hilliard*, 121 F. 2d 992; *United States* v. *Hirsch*, 74 F. 2d 215; *United States* v. *Kushner*, 135 F. 2d 668, 674; *United States* v. *Curzio*, 179 F. 2d 380). But there is no case which holds that a bald statement by the Court that an unresponsive, gratuitous, voluntary and harmful (and the record shows that it was not inadvertent but deliberate) answer was not prejudicial, can be cured by the Court ordering it stricken and then pointedly inquiring of the jury whether it would be prejudiced. (See dissenting opinion in *United States* v. *Stoppelli*, 183 F. 2d 391).

CONCLUSION

The judgments of conviction should be reversed and a new trial ordered.

Respectfully submitted,

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